



Report to the Auburn City Council

Action Item
Agenda Item No. 13
City Manager's Approval

To: Mayor and City Council Members
From: Michael G. Colantuono, City Attorney
Date: June 8, 2009
Subject: First Reading of Ordinance re Solicitations

The Issue

Shall the Council waive full reading and introduce for first reading an ordinance to amend Chapter 116 of the Municipal Code relating to Solicitations?

Conclusions and Recommendations

The City Attorney and the Chief of Police recommend the Council waive full reading and adopt the attached ordinance to amend Chapter 116 of the Auburn Municipal Code. The City's existing solicitation ordinance was last revised in 1977 and there have been substantial changes in First Amendment case law which should be reflected in the City's Code if its solicitation ordinance is to be enforceable. This ordinance is one of a series of past and planned ordinances to update the City's code to reflect current legal requirements.

Background

Existing Ordinance

In 1973, existing Chapter 116 was added to the City's municipal code, and it was most recently revised in 1977. The municipal code prohibits the sale or attempted sale of goods on city streets or sidewalks without the prior approval of the Police Chief. Additionally, no person may enter any residential real property for the purposes of solicitation without first having obtained a permit from the Police Chief, or permission from the owner or occupant.

The Police Chief may only issue a permit if the applicant paid the required processing fee and the Chief finds the "applicant is of sound moral character, is financially responsible, and that the proposed activity will not unreasonably interfere with vehicular or pedestrian traffic control or the reasonable enjoyment of the residential use of real property of the citizens of the city." The applicant may appeal any denial of a permit application.

Since the code's last amendment more than 35 years ago, courts have substantially refined the legal standards relating to municipal regulation of solicitation. The level of discretion afforded the Police Chief under the existing code and the relatively amorphous standards under which that

discretion is exercise are no longer consistent with judicial interpretations of the First Amendment as applied in the context of solicitation ordinances.

Proposed Ordinance

Like the current ordinance, the proposed ordinance prohibits “solicitation” in the city without first having obtained a permit from the city manager authorizing such solicitation. Authority is granted to the city manager because Section 10.09 of the code allows any duty or power under the code to be delegated. We generally reference only the city manager in the code (and the community development director in the zoning ordinance) to avoid the need for code amendments as position titles and responsibilities change over time.

The new ordinance broadens the definition of “solicitation” to include more *types* of solicitation including, for example, individuals seeking work to avoid any contention that the ordinance regulates based on the content of the speech involved. The ordinance now clearly also applies to the distribution of handbills. The *location* of such regulated solicitations is also expanded to include “any place of business open to the public generally” (e.g., shopping centers). The ordinance expressly does *not* regulate political or religious speech because the City cannot regulate that speech as it can regulate commercial speech. However, the ordinance consciously applies to all charitable or commercial solicitations because any exceptions for favored classes of speakers will make the ordinance vulnerable to First Amendment challenge.

When a permit has been issued to any person, the agents and solicitors for such person are not required to obtain individual permits. Each solicitor is required to carry proof of a valid solicitation permit.

No person may solicit any dwelling if there is a sign indicating “No Solicitations,” “Do Not Disturb” or any similar posting. Various forms of aggressive solicitation are also prohibited, as are fraudulent solicitations and solicitations from moving vehicles.

To obtain a permit, the permit application must be filed at least seven days prior to any solicitation, unless good cause is shown. The City Manager must issue the permit unless the City Manager makes one of three specific findings (that the application is incomplete, the proposed activity would be illegal, or the application is false). If the permit is denied, the applicant may appeal the denial to the City Council. Permits will be issued for periods of between 30 days and six months.

Any person violating the chapter is guilty of a misdemeanor although it is not anticipated that the City will routinely use criminal enforcement of this method absent reason to believe more serious crime is involved (as someone posing as a solicitor to “case” a property or stalk someone). The City is more likely to rely on warnings, administrative citations, and other non-criminal methods. Nonetheless the Chief of Police recommends retaining the possibility of criminal enforcement in appropriate cases.

Alternatives Available; Implications of Alternatives

The Council may elect not to adopt the ordinance, in which case I would recommend the City not enforce its existing solicitation ordinance to protect the City from First Amendment claims.

Alternatively, the Council could decline to adopt this ordinance, but act to repeal the existing solicitation ordinance. Finally, the Council may defer this matter to request additional information of staff.

Fiscal Impact

The staff and legal services necessary to prepare this ordinance are budgeted resources. Adoption of the ordinance will update the municipal code consistent with current law, thereby decreasing the City's potential liability and need for legal services. The expansion of the scope of the regulation of solicitations should not meaningfully affect the workload of city police officers.

Summary Recommendation:

The City Attorney and the Chief of Police recommend that the Council act to waive full reading and introduce the attached ordinance.

c: Bob Richardson, City Manager
 Valerie Harris, Chief of Police

EXHIBIT A

Chapter 116

SOLICITATION

Section

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116.01 Purpose; Intent.

The purpose of this chapter is to regulate solicitation in the city to allow residents to protect their peace and tranquility to and to deter fraud and other criminal behavior. It is the intent of this chapter to respect the rights of free expression guaranteed by the California Constitution and the United States Constitution; to constitute reasonable, content-neutral, time, place and manner restrictions; and to impose the smallest burden on expressive activity necessary to accomplish the objectives of this chapter. This chapter shall be construed in light of this intent.

116.02 Definition.

(A) "Solicit" and "Solicitation" shall mean the request, directly or indirectly, of money, credit, property, financial assistance, patronage or other things of value; hawking, peddling, or vending for charitable (as defined in this section) or commercial purposes; or offering to perform services for payment, which activity is conducted door to door, in any place of public accommodation, in any place of business open to the public generally, on city streets and sidewalks, in the public parks, or in any public places. These words shall also mean and include the following methods of securing such money, patronage, credit, property, financial assistance or other thing of value:

(1) Any oral or written request;

(2) The distribution, circulation, posting or publishing of any handbill, written advertisement or other publication, unless such handbill or written advertisement has been placed within a business open to the public generally with the express permission of the owner

or operator of such business;

(3) The offer, sale or taking of orders for any goods, services, merchandise, wares or other tangible items.

A solicitation, as defined in this subsection, shall be deemed completed when made, whether or not the person making the same receives any contribution or makes any sale referred to in this subsection.

(B) "Charitable" shall mean and include the words philanthropic, social service, welfare, benevolent, educational, and fraternal, either actual or purported, but not religious or political.

116.03 Solicitation Permit Required.

No person shall engage in solicitation, as that term is defined in section 116.02, within the city without having first obtained a permit from the city manager authorizing such solicitation; but when a permit has been issued to any person, the agents and solicitors for such person shall not be required to obtain individual permits.

116.04 Exemptions.

The provisions of this chapter shall not apply to solicitations made upon premises owned or occupied by the organization on whose behalf such solicitation is made.

116.05 Application Permit.

(A) An application for permit to solicit shall be made to the city manager upon forms prescribed by the city manager and signed under penalty of perjury. The application shall be filed with the city manager at least seven calendar days before a permit to conduct a solicitation may become effective; provided, however, that the city manager may for good cause shown allow the filing of a late application. The city manager shall grant or deny the permit within five business days after the application is made. In the event the city manager fails to act upon a permit within the time prescribed herein, the permit shall be deemed granted.

(B) An application for a solicitation permit shall contain at least the following information: address, telephone and other contact information for the applicant; the purpose for which the solicitation is to be made; the total amount of any funds to be raised thereby, if any; and the use or disposition to be made of any receipts; an outline of the method or methods to be used in conducting the solicitations, including dates and times for the commencement, conduct and termination of the solicitation; a statement to the effect that if a permit is granted, it will not be used or represented in any way as an endorsement by the city or by any department, officer or employee thereof; the names of other cities or unincorporated areas in which the person registering has solicited or proposes to solicit; and an explanation of the reasons, if the applicant is unable to provide any of the foregoing information, why such information is not available.

(C) If, while any application is pending, or during the term of any permit, there is any change in fact, policy, or method that would alter the information given in the application, the applicant shall notify the city manager in writing thereof within twenty-four (24) hours after such

change.

116.06 Issuance of Permit.

The city manager shall issue a permit for solicitation unless any of the following have been demonstrated:

(A) That the applicant has failed to provide the required information or to articulate a reasonable basis for his or her inability to do so;

(B) That any statement made in the application is untrue; or

(C) That the proposed time, place or manner of solicitation is inconsistent with any provision of this code or other applicable law or poses a threat to the public health or safety.

In the event the city manager denies a permit to any applicant, the city manager, within the time for action on an application set forth in paragraph (A) of section 116.05, shall arrange to send by registered mail or personal delivery written notice of the denial to the applicant, stating the reasons for such denial. The city manager may use fax, email or any other means reasonably calculated to give actual notice to the applicant.

116.07 Term of Permit.

All permits issued under this chapter shall be valid for a period of thirty calendar days unless renewed, revoked or suspended pursuant to the provisions of this chapter. Upon good cause shown, the city manager may issue a permit valid for more than thirty (30) calendar days, but in no event shall a permit be valid for more than six months. Any permit issued under this chapter shall not be transferable or assignable.

116.08 Identification Card.

All persons to whom permits have been issued hereunder shall furnish an identification card to their agents and solicitors which card is required to be in the possession of each agent and solicitor and presented upon request when soliciting in the city. Identification cards shall include the permit number, the name and address of the permittee, a statement describing the permittee's purpose and activity, the signature of the permittee or one authorized to bind the permittee, the name and signature of the solicitor to whom the card is issued, the specific period of time during which the solicitation is authorized, and shall have printed prominently thereon in red: 'This identification card is not an endorsement of any solicitation by the City of Auburn or any of its officers or employees.'

116.09 Revocation of Permit.

Whenever it shall be shown that any person to whom a permit has been issued under this chapter has violated any of the provisions hereof or has violated any other law in connection with the solicitation described in the permit application, the city manager shall immediately suspend the permit and shall notify the permit holder within two business days of the suspension in the manner specified in section 116.06 for a notice of denial of a solicitation application, stating the reasons for the suspension.

116.10 Appeals.

If an applicant or permittee is aggrieved by any action of the city manager to deny, suspend or revoke a permit, he or she may appeal to the city council by filing within fifteen (15) calendar days of the decision a written statement with the city clerk setting forth reasons for the appeal. The city clerk shall set a time and place for hearing the appeal at the next regularly scheduled council meeting which occurs more than 84 hours after the notice of appeal is received and notify the applicant or permit holder of the time and place of hearing. The city council may affirm, reverse or affirm with conditions, the decision of the city manager applying the standards of this chapter. The action of the city council shall be final as to the city, but shall be subject to judicial review pursuant to Code of Civil Procedure section 1094.5.

116.11 Manner of Solicitation and Prohibitions.

(A) No person shall solicit without a permit and without carrying the identification card required by this chapter on his or her person at all times while soliciting.

(B) No person shall solicit after a permit has expired.

(C) No person shall solicit at any dwelling, including but not limited to a house, apartment, or condominium where there is a sign indicating "No Solicitations," "Do Not Disturb," or any other indication that the occupants do not wish to be solicited or to have their privacy disturbed in any other way.

(D) No person shall touch, come into physical contact with, or affix any object to the person of any member of the public, without the express permission of that member of the public.

(E) No person shall persistently and importunately solicit any member of the public after such member of the public expresses his or her desire not to be solicited.

(F) No person shall intentionally and deliberately obstruct the free movement of any member of the public on any street, sidewalk or other place or in any place open to the public generally.

(G) No person shall threaten any injury or damage to any member of the public who declines to be solicited.

(H) No person shall misrepresent his or her physical or mental health while soliciting.

(I) No person shall solicit funds in the city for any purpose other than purpose(s) specified in the application upon which the permit was issued;

(J) No person shall, while the occupant of a moving vehicle, solicit, or attempt to solicit, business or contributions of money or other property, from a person within the public right-of-way.

116.12 Violations; Penalties.

Any person or entity that violates any provision of this chapter is guilty of a misdemeanor punishable as provided in chapter 10 of this code.

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF AUBURN AMENDING
CHAPTER 116 OF THE AUBURN MUNICIPAL CODE REGARDING SOLICITORS

Section One: The City Council of the City of Auburn hereby finds:

1. Individuals and organizations have visited and continue to visit private residential properties, and privately-owned businesses, to peddle goods, wares, merchandise, and services.
2. Some residents and business owners find these activities to not only be threatening but also an invasion of privacy.
3. In addition, some individuals who have claimed to be solicitors have committed fraud and other crimes against residents and business owners.
4. Some solicitors have created a negative, threatening and unwelcoming environment in public places.
5. Unregulated solicitation within the City has become disturbing and disruptive to residents and businesses, and has contributed not only to the loss of access to and enjoyment of public places and private residences, but also to an enhanced sense of fear, intimidation and disorder.
6. It is the intent of the City Council in enacting this ordinance to improve the quality of life and economic vitality of the City, and to protect the safety of the general public against abusive conduct of persons engaged in solicitation, by imposing reasonable manner and place restrictions on solicitation while respecting the constitutional rights of free speech for all.

1 Section Two: Chapter 116 of the Auburn Municipal Code is hereby
2 repealed.

3
4 Section Three: A new Chapter 116 of the Auburn Municipal Code is
5 hereby adopted in the form attached hereto as Exhibit A.

6 Section Four: This Ordinance shall take effect thirty days following its
7 adoption as provided by Government Code Section 36937.

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9 Section Five: Should any provision, section, paragraph, sentence or
10 word of this Ordinance be rendered or declared invalid by any court of
11 competent jurisdiction or by reason of any preemptive legislation, the
12 remaining provisions, sections, paragraphs, sentences or words of this
13 Ordinance shall remain in full force and effect.

14 Section Six: The City Clerk shall certify to the passage and adoption
15 of this Ordinance and shall give notice of its adoption as required by law.
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17 DATED: _____, 2009

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19 _____
20 M.J. Holmes, Mayor

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23 ATTEST:

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25 _____
26 Joseph G. R. Labrie, City Clerk

27 I, Joseph G. R. Labrie, City Clerk of the City of Auburn, hereby certify
28 that the foregoing ordinance was duly passed at a regular meeting of the City
Council of the City of Auburn held on the _____ day of _____ 2009 by
the following vote on roll call:

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Ayes:
Noes:
Absent:

Joseph G. R. Labrie, City Clerk

APPROVED AS TO FORM:

Michael G. Colantuono, City Attorney